OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 15-02 February 10, 2015

TO: All Regional Directors, Officers-in-Charge,
And Resident Officers

FROM: Richard F. Griffin, Jr., General Counsel /s/

SUBJECT: Guideline Memorandum Concerning Deferral to Arbitral Awards, the Arbitral Process, and Grievance Settlements in Section 8(a)(1) and (3) cases

## I. Introduction

In its seminal decision in *Spielberg Manufacturing Co.*,[1] the Board decided that it would defer, as a matter of discretion, to an arbitrator's decision in cases where the arbitral proceedings appear to have been fair and regular, all parties agreed to be bound, and the arbitrator's decision was not clearly repugnant to the purposes and policies of the Act. After some years of experience applying *Spielberg*, the Board expanded on that test by requiring an arbitrator to have considered the unfair labor practice issue (i.e., the "statutory issue").[2] In *Olin Corp.*,[3] the Board relaxed the consideration requirement, holding that it was satisfied if the contractual and statutory issues were factually parallel and the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. In addition, *Olin* placed the burden on the party opposing deferral to demonstrate that the deferral criteria were not met.[4]

In *Babcock & Wilcox Construction Co.*,[5] the Board revisited *Olin* and held that the existing postarbitral deferral standard did not adequately balance the protection of employee rights under the Act and the national policy of encouraging arbitration of disputes over the application or interpretation of collective-bargaining agreements. The Board reasoned that the existing standard created excessive risk

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[1] 112 NLRB 1080, 1082 (1955).

[2] *See Raytheon Co.*, 140 NLRB 883, 884-85 (1963), *enforcement denied*, 326 F.2d 471 (1st Cir. 1964).

[3] 268 NLRB 573, 574 (1984).

[4] *Id.*

[5] 361 NLRB No. 132 (Dec. 15, 2014).

that the Board would defer when an arbitrator had not adequately considered the unfair labor practice issue, or when it was impossible to tell whether that issue had been considered.

In order to adequately ensure that employees' Section 7 rights are protected in the course of the arbitral process, *Babcock* announced a new standard for deferring to arbitral decisions in Section 8(a)(1) and (3) cases.[6] In so doing, the Board also modified the standards for prearbitral deferral and deferral to grievance settlements in these types of cases. This memorandum explains these new standards, describes the circumstances in which they apply to pending and future cases, and provides guidance on handling cases that implicate these issues.

## II. Postarbitral Deferral

### A. Overview of the *Babcock* Standard and Burden Allocation

Under *Babcock*, deferral to an arbitral decision is appropriate in Section 8(a)(1) and (3) cases where the arbitration procedures appear to have been fair and regular, the parties agreed to be bound,[7] and the party urging deferral demonstrates that: (1) the arbitrator was explicitly authorized to decide the unfair labor practice issue; (2) the arbitrator was presented with and considered the statutory issue, or was prevented from doing so by the party opposing deferral; and (3) Board law "reasonably permits" the arbitral award.[8] The meaning of each of these three new prongs in the postarbitral deferral test is discussed in more detail below. It is important to underscore that *Babcock* places the burden of proving that the deferral standard is satisfied on the party urging deferral, typically the employer, which is another significant change from the *Olin* standard.[9]

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[6] We interpret *Babcock* as applying not only to cases involving Section 8(a)(1) and (3) discipline and discharge, but also to other Section 8(a)(1) and (3) conduct cognizable under a contractual grievance provision. Such conduct likewise implicates employees' Section 7 rights, and therefore falls within the scope of the Board's policy rationale for adopting new deferral standards. By contrast, the processing of Section 8(a)(5) allegations will be unchanged, except where they are entwined with related Section 8(a)(1) and/or (3) allegations. *See, infra*, fn. 50.

[7] These traditional requirements under *Spielberg* and *Olin* were not affected by the *Babcock* decision.

[8] Since the Board has now adopted a new postarbitral deferral standard, Regions should no longer follow Memorandum GC 11-05 (Jan. 20, 2011), which outlined a different proposed framework.

[9] 361 NLRB No. 132, slip op. at 10.

B. Explanation of the *Babcock* Requirements

1. Explicit Authorization

Under *Babcock*, an arbitrator must be explicitly authorized to decide the statutory issue in order to defer to the arbitral award. This requirement can be met by showing either that: (1) the specific statutory right at issue was incorporated in the collective-bargaining agreement, or (2) the parties agreed to authorize arbitration of the statutory issue in the particular case.[10]

Significantly, the *Babcock* standard treats explicit authorization as a threshold requirement, that is, deferral is never warranted if this requirement is not met. The Board reasoned that arbitration is a consensual matter and it will not assume that the parties have agreed to submit statutory claims to the grievance process. Consequently, each party to a collective-bargaining agreement has the prerogative to decide not to arbitrate statutory claims by refusing to agree to a contract incorporating the statutory right or to otherwise agree to arbitrate the statutory issue.[11] That is, a party will retain the option of adjudicating a statutory claim before the Board in the event the arbitrator denies the grievance where the collective-bargaining agreement is silent as to the statutory right and the party refused to authorize arbitration of the claim in the particular case.

CASEHANDLING INSTRUCTIONS: The Region should submit to the Division of Advice any questions about whether a specific statutory right was incorporated into the collective-bargaining agreement or whether the parties agreed to arbitrate the statutory issue in the particular case.

2. Statutory Issue was Presented and Considered

The *Babcock* standard requires that the arbitrator was "actually presented" with and "actually considered" the statutory issue in order to defer to an arbitral award.[12] It therefore abandons *Olin*'s *de facto* presumption that "if an arbitrator is presented in some fashion with facts relevant to both an alleged contract violation

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[10] *Id.*, slip op. at 2, 5. The Board noted that contract language prohibiting retaliation for engaging in union activity would be sufficient to show that the statutory right was incorporated in the collective-bargaining agreement in a case, like *Babcock*, where the union argued during the grievance process that the employee was discharged for engaging in steward activities. *Id.*, slip op. at 6, 11.

[11] *Id.*, slip op. at 11.

[12] *Id.*, slip op. at 6, 7, 10, 11 (emphasis omitted).

and an alleged unfair labor practice, the arbitrator necessarily was presented with, and decided, the latter allegation in the course of deciding the former."[13]

The *Babcock* Board observed that either party can raise the statutory issue before the arbitrator.[14] Merely informing the arbitrator of the unfair labor practice allegation in a pending charge will usually be sufficient to show that the issue had been presented.[15]

In order to show that the arbitrator actually considered the statutory issue, the Board will require that the arbitrator "identified that issue and at least generally explained why . . . the facts presented either do or do not support the unfair labor practice allegation."[16] The Board will not require that an arbitrator conduct a "detailed exegesis" of Board law, since many arbitrators, as well as union and employer representatives in arbitral proceedings, are not trained in labor law.[17] But the Board will not assume that an arbitrator implicitly ruled on the statutory issue if the award merely upholds disciplinary action under a "just cause" analysis; rather, the arbitrator must make explicit that the action was not in retaliation for an employee's protected activities.[18]

Although the Board did not explicitly return to the deferral principles set forth in *Suburban Motor Freight, Inc.*,[19] which predated *Olin*, certain cases decided under that earlier standard illustrate *Babcock*'s "actual consideration" principle. For example, in *Inland Steel Co.*,[20] the Board found that deferral to an arbitral

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[13] *Id.*, slip op. at 5.

[14] *Id.*, slip op. at 7.

[15] *Id.*, slip op. at 7 n.14.

[16] *Id.*, slip op. at 7.

[17] *Id.* Thus, the Board declined to adopt a requirement that the arbitrator correctly enunciated the applicable statutory principles and applied them in deciding the statutory issue. *Id.*

[18] *Id.*, slip op. at 8, 11.

[19] 247 NLRB 146, 146-47 (1980) (deferral unwarranted unless the statutory issue was both presented to and considered by the arbitrator; no deference will be given where arbitral award does not indicate whether arbitrator "ruled on" the unfair labor practice issue), *overruled as recognized in Altoona Hospital*, 270 NLRB 1179, 1179 (1984).

[20] 263 NLRB 1091, 1091, 1097 (1982).

award finding "just and proper cause" for an employee's discharge was appropriate where the arbitrator expressly found that the employee was discharged for providing false information on her employment application rather than for her union activities. Specifically, the arbitrator reasoned that the employer harbored no anti-union animus in light of its longstanding knowledge and tolerance of the employee's union activities and that it merely followed its uniform policy and practice of terminating employees for such falsifications.[21] In these circumstances, the Board observed that the "parties clearly litigated the statutory issue of discrimination before the arbitrator and he clearly considered that issue in deciding [the] grievance."[22] In contrast, deferral was rejected in cases where the arbitral award did not discuss the facts relevant to the statutory issue, did not draw any conclusions based on the unfair labor practice evidence presented, or made no determination as to the real reason for the employer's actions.[23] Notably, the Board also refused to defer in cases where the arbitral award disavowed any intention of

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[21] *Id*. at 1096-97.

[22] *Id*. at 1091.

[23] *See, e.g.*, *Joyce Brothers Storage*, 263 NLRB 544, 548-49 (1982) (deferral unwarranted where arbitral panel denied grievance without any rationale; no proof panel considered whether union activity motivated discharge where hearing minutes disclosed no discussion of "factors germane to the statutory issue" and no analysis of evidence presented); *Phil Smidt & Son, Inc.*, 260 NLRB 668, 668 n.1, 670-71 (1982) (deferral unwarranted where arbitral decision merely assessed whether reasons given for discharge were supported by the evidence and amounted to "just cause"; arbitrator did not consider whether employer's proffered justifications were pretextual or whether employee's arguably protected attempt to document favoritism motivated the discharge); *Magnetics International, Inc.*, 254 NLRB 520, 520 n.2, 523 (1981) (deferral unwarranted where arbitration decision merely recited parties' contentions and announced that insubordination amounted to "just contractual cause," but did not draw conclusions as to the evidence of unlawful motive and did not decide if the legitimate basis for discharge was mixed with unlawful considerations), *enforced*, 699 F.2d 806 (6th Cir. 1983); *General Warehouse Corp.*, 247 NLRB 1073, 1074, 1076 (1980) (deferral unwarranted where arbitral decision framed the issue in terms of "just cause," only discussed absenteeism evidence, and did not make findings concerning discriminatee's protected activity of opposing waiver of cost-of-living increase), *enforced*, 643 F.2d 965 (3d Cir. 1981); *Koppel, Inc.*, 251 NLRB 567, 569-72 (1980) (deferral unwarranted where arbitral decision did not address argument that employer's decision to return employee to the dispatch hall was in retaliation for protected complaints about safety and manning; arbitrator's statement at the hearing that he would consider all the evidence and arguments insufficient).

deciding the unfair labor practice, but where the arbitrator nonetheless made gratuitous comments or findings as to the merits of the statutory claim.[24]

The *Babcock* Board articulated an exception to the above requirements, which permits deferral absent presentation and consideration if the statutory right is incorporated in the collective-bargaining agreement and one party affirmatively prevented the other party from raising the unfair labor practice issue before the arbitrator.[25] The Board anticipates that this exception will rarely apply.[26] Typically, both parties will be motivated to litigate the unfair labor practice in the arbitral proceeding, and the employer will be able to raise the statutory issue if the union does not.[27] In order to address the concern that unions might withhold evidence relevant to the statutory issue during the arbitral proceeding for the purpose of defeating deferral, *Babcock* provides that in the event the issue is placed before an arbitrator but a party fails to introduce such evidence, the Board will assess whether the arbitral award is reasonably permitted in light of the evidence that was before the arbitrator.[28] This creates a disincentive against withholding evidence in an attempt to avoid an arbitral ruling on the statutory issue if a party initially authorized arbitration of the issue and the other party at least raised it in the arbitral proceeding.

CASEHANDLING INSTRUCTIONS: The Region should submit any questions concerning whether the statutory issue was presented to and considered by the arbitrator to the Division of Advice. Likewise, any case where a party argues that it was prevented from placing the statutory issue before the arbitrator, including

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[24] *See B & W Construction Co.*, 263 NLRB 405, 405 n.3 (1982), *enforced sub nom. NLRB v. Babcock & Wilcox Co.*, 736 F.2d 1410 (10th Cir. 1984); *Professional Porter & Window Cleaning Co.*, 263 NLRB 136, 136-37 (1982), *enforced*, 742 F.2d 1438 (2d Cir. 1983) (table decision).

[25] 361 NLRB No. 132, slip op. at 6-7.

[26] *Id.*, slip op. at 6-7 & n.12.

[27] *Id.*, slip op. at 7 & n.12. The Board also emphasized that its adoption of this narrow exception did not signal a return to *Electronic Reproduction Service Corp.*, 213 NLRB 758, 762, 764 (1974), *overruled by Suburban Motor Freight*, 247 NLRB at 146, which held that deferral would normally be appropriate so long as there was a mere opportunity to present the statutory issue, even if the record did not disclose whether it was raised by the parties or considered by the arbitrator. 361 NLRB No. 132, slip op. at 7 & n.13.

[28] *Id.*, slip op. at 7.

situations where a union waited to file an unfair labor practice charge until after the arbitration,[29] should be submitted to Advice.

3. Arbitral Award is Reasonably Permitted Under Board Law

Under *Spielberg* and *Olin*, deferral was improper if the arbitral award was "clearly repugnant" to the Act, that is, the award was "palpably wrong" or "not susceptible to an interpretation consistent with the Act."[30] In applying this standard, the Board would defer unless there was "no conceivable reading of the facts in a given case that would support the arbitrator's decision."[31] Thus, the Board routinely deferred to arbitral awards that were adverse to disciplined or discharged employees even if there was "considerable evidence" of an unlawful motive.[32]

The *Babcock* Board found that the "clearly repugnant" standard failed to adequately protect employees' statutory rights and adopted a new inquiry for assessing arbitral awards: whether Board law reasonably permits the arbitrator's decision. Under this new standard, the award must represent a "reasonable application of the statutory principles that would govern the Board's decision."[33] The arbitrator need not rule exactly as the Board would have ruled; in other words, the Board will not engage in the equivalent of *de novo* review of the arbitrator's decision. Rather, the award need only reach a result a "decision maker reasonably applying the Act could reach."[34] We interpret the Board's rejection of *de novo* review to mean that it will give some deference to the arbitrator's factual findings, including credibility resolutions, in determining whether the result is reasonably permitted under Board law.

With regard to remedial questions, the arbitrator's remedy need not exactly match the remedy the Board would have imposed, although the absence of any

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[29] *See id.*, slip op. at 32 (Member Johnson, dissenting) (questioning whether waiting to file an unfair labor practice charge would be considered acting "affirmatively" to prevent consideration of the statutory issue in the arbitral forum).

[30] *Spielberg*, 112 NLRB at 1082; *Olin*, 268 NLRB at 574.

[31] 361 NLRB No. 132, slip op. at 8.

[32] *Id.*

[33] *Id.*, slip op. at 7.

[34] *Id.*

effective remedy would preclude deferral.[35] For example, the Board noted that deferral might be proper even if the award allowed the employer to deduct unemployment compensation from backpay, which is contrary to Board policy concerning backpay offsets.[36] We would extend this rationale to cases where an arbitrator failed to order the respondent to post a notice, compensate the discriminatee for excess Federal and State income taxes paid as a result of receiving a lump-sum backpay award covering more than one year,[37] or report the discriminatee's backpay allocation to the Social Security Administration,[38] or where there were other similar remedial deficiencies.

CASEHANDLING INSTRUCTIONS: The Region should submit to the Division of Advice any case where the arbitral ruling on the statutory issue arguably fails to satisfy the "reasonably permitted" requirement, such as where an arbitrator places no weight on facts critical to the unfair labor practice or misconstrues Board law. As to cases presenting remedial deficiencies, the Region may, at its discretion, defer whenever the relief granted by the arbitral award is such that the Region would have the authority to unilaterally accept it as settlement of the unfair labor practice charge.[39] The Region should submit to the Division of Advice any case where it seeks to issue complaint on the basis that an arbitral remedy is insufficient, including cases where the Region wishes to challenge an arbitral award on the basis that it failed to provide a notice posting in light of the circumstances of that particular case.

C. Application of the *Babcock* Postarbitral Deferral Standard to Pending and Future Cases

The Board indicated that it would apply the new postarbitral deferral standard prospectively ("in future cases") and not retroactively ("i.e., in all pending

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[35] *Id.*, slip op. at 7 n.16.

[36] *Id.*

[37] *See Latino Express*, *Inc.,* 359 NLRB No. 44 (Dec. 18, 2012), *reaffirmed in Tortillas Don Chavas*, 361 NLRB No. 10, slip op. at 2 (Aug. 8, 2014).

[38] *See id.*

[39] *See* Casehandling Manual, Compliance Proceedings § 10592.1 (defining authority of Regional Directors to accept backpay settlements agreed to by all parties and discriminatees); *see also* Casehandling Manual, Unfair Labor Practice Proceedings §§ 10150-10150.2 (outlining the procedure for regional approval of unilateral informal settlements).

cases").[40] In actuality, the Board has taken a more nuanced, hybrid approach under which the new standard will apply to some pending charges (i.e., some charges presently on administrative deferral) and the old standard will continue to apply to some charges filed after *Babcock*. The date the unfair labor practice charge was filed is, thus, irrelevant in deciding which standard applies. Rather, Regions should apply the following rules to determine whether to evaluate an arbitral award under *Olin* or *Babcock* in pending and future cases raising allegations under Section 8(a)(1) and (3):

- *Olin* applies if the arbitration hearing occurred on or before December 15, 2014, the date the *Babcock* decision issued;

- *Babcock* applies if the collective-bargaining agreement under which the grievance arose was executed after December 15, 2014.[41]

- If the collective-bargaining agreement under which the grievance arose was executed on or before December 15, 2014, and the arbitration hearing occurred after December 15, 2014, which standard applies depends on whether the arbitrator was explicitly authorized to decide the statutory question (either in the collective-bargaining agreement or by agreement of the parties in a particular case). If the arbitrator was so authorized, then *Babcock* applies, even if the Region initially placed the case on administrative deferral pursuant to the preexisting standard for prearbitral deferral.[42] If the arbitrator was not authorized to decide the statutory issue, then *Olin* applies.

Notwithstanding the Board's statement that, absent explicit authorization to arbitrate the statutory issue, it "will not apply the new standards until [contracts

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[40] 361 NLRB No. 132, slip op. at 13-14.

[41] We would likewise apply *Babcock* if the grievance arose under a collective-bargaining agreement that automatically renewed after December 15, 2014 because neither party took action to reopen negotiations pursuant to a contractual renewal clause. Similarly, we would apply *Babcock* if the grievance arose under a post-*Babcock* agreement to extend an expired contract for a set term, unless it was a temporary extension to allow the parties to continue bargaining over a successor collective-bargaining agreement. In that case, which standard applies depends on whether the arbitrator was explicitly authorized to decide the unfair labor practice.

[42] Such cases will necessarily meet the first prong of *Babcock*, and the Board decided that it is therefore appropriate to apply the remaining criteria of the new standard because it will not contravene the parties' settled expectations. 361 NLRB No. 132, slip op. at 14.

executed prior to *Babcock*] *have expired*,"[43] we would not treat contract expiration as a strict cutoff date for applying *Olin*. Specifically, we would apply *Olin* to any grievance arising under a pre-*Babcock* contract, even if the arbitral hearing occurred after the contract's expiration, assuming there is no explicit authorization to decide the statutory issue. Such an approach best accommodates the Board's rationale surrounding retroactivity. The Board decided to delay application of the new deferral standard in cases where explicit authorization is absent because parties relied on the preexisting deferral scheme in negotiating their contracts and processing grievances. In particular, parties had no expectation that deferral would be withheld if they did not incorporate the statutory right in their agreement or otherwise agree to arbitrate the unfair labor practice. And they likewise assumed that an arbitration award resolving a grievance arising under their contract would be assessed under *Olin*, regardless of whether the arbitration took place before or after the contract expired. Thus, by applying *Olin* to all grievances that occurred during the life of a pre-*Babcock* contract in cases where the parties did not authorize arbitration of the unfair labor practice, our approach gives parties the full benefit of the bargain they struck and comports with their settled expectations as to whether the resolution of grievances arising under their contract would warrant deferral.[44]

## III. Prearbitral Deferral

The *Babcock* Board determined that the above modifications to the standard for reviewing arbitral awards necessitated a change in the criteria for administratively placing a Section 8(a)(1) or (3) charge on deferral pending the outcome of the arbitral process, as set forth in *Collyer Insulated Wire*[45] and *United Technologies Corp*.[46] Accordingly, the Board will no longer defer cases to the arbitral process unless the arbitrator is explicitly authorized to decide the statutory issue (either in the collective-bargaining agreement or by agreement of the parties

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[43] *Id*. (emphasis added). The Board elsewhere references the time period before "new contracts are concluded," *id.*, slip op. at 14 n.39, and appears to conflate the expiration of pre-*Babcock* agreements and the negotiation of post-*Babcock* agreements.

[44] In cases where the Region issued complaint prior to the *Babcock* decision pursuant to the theory that the arbitral award is clearly repugnant under *Olin* and that the Board should adopt a different deferral standard, the Region should continue to litigate the case and argue only that the award is repugnant.

[45] 192 NLRB 837, 841-42 (1971).

[46] 268 NLRB 557, 558 (1984).

in a particular case).[47] This is because it would be futile to place a case on hold pending arbitration if it is clear from the outset that deferral to that ultimate award would be improper.

Although the Board did not indicate whether this new standard would apply prospectively or retroactively, we infer that the new prearbitral deferral standard will apply only if the new postarbitral deferral standard would apply to the ultimate arbitration.

CASEHANDLING INSTRUCTIONS: With respect to cases currently on *Collyer* deferral, the Region should send letters (template attached) to parties notifying them of the *Babcock* decision, attaching this memorandum, and instructing them as to the circumstances under which the new deferral standards may apply. With respect to future charges in which a party raises prearbitral deferral as a defense to allegations under Section 8(a)(1) and (3), the Region must take into account which standard will apply to the ultimate arbitration in deciding whether to place the case on administrative deferral. In processing such cases, the Region should proceed as follows.[48]

First, the Region should assess whether the statutory right at issue is incorporated in the applicable collective-bargaining agreement. As with postarbitral deferral, any questions about whether a specific statutory right has been incorporated into the agreement should be submitted to the Division of Advice. If it is so incorporated, the Region should place the case on administrative deferral, provided all of the other *Collyer* requirements are met and there is arguable

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[47] 361 NLRB No. 132, slip op. at 12-13. Although the *Babcock* decision only discussed this new requirement in the context of *Collyer* deferral, we assume that it would also apply to cases where *Dubo* deferral is raised, i.e., where the unfair labor practice issue is being processed through the grievance-arbitration machinery and there is a reasonable chance that use of that machinery will resolve the dispute or put it to rest. *See Dubo Manufacturing Corp.*, 142 NLRB 431 (1963); Memorandum GC 79-36, *Procedures for Application of the* Dubo *Policy to Pending Charges*, dated May 14, 1979, at 1.

[48] In any case where administrative deferral is appropriate, the Region should use the attached *Collyer* or *Dubo* deferral letters (instead of the *Collyer* letter appearing in the Casehandling Manual, Unfair Labor Practice Proceedings Section 10118.6) and select the appropriate pattern language relevant to the circumstances of the case. The *Collyer* and *Dubo* deferral letter templates in NxGen have been updated accordingly.

merit.[49] Once an arbitration award issues, the Region should assess it under *Babcock*.

Next, if the statutory right is not incorporated in the contract, the Region should ask both parties if they will authorize the arbitrator to decide the unfair labor practice. If the parties so authorize, the Region should obtain such commitments in writing and place the case on administrative deferral, provided all of the other *Collyer* requirements are met and there is arguable merit. Once an arbitration award issues, the Region should assess it under *Babcock*.

Finally, if the statutory right is not incorporated in the contract and one or both parties refuse to authorize arbitration of the unfair labor practice, how the case should be processed will depend on whether the applicable contract was executed before or after December 15, 2014, the date the *Babcock* decision issued. If the contract was executed on or before that date, the Region should place the case on administrative deferral, provided that *Collyer* requirements are met and there is arguable merit. Once an arbitration award issues, the Region should assess it under *Olin*. After placing the case on deferral, if the Region learns that the parties have subsequently agreed to authorize arbitration of the unfair labor practice, the Region should keep the case on administrative deferral, but apply *Babcock* once an award issues. If the contract was executed after December 15, 2014, the Region should conduct a full investigation of the merits and issue complaint or dismiss the charge accordingly. If, after issuing complaint, the Region learns that the parties have subsequently agreed to authorize arbitration of the unfair labor practice, the Region should place the case on administrative deferral and apply *Babcock* once an award issues.[50]

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[49] Arguable merit should be determined based on affidavits from the charging party and witnesses within that party's control. At the Region's discretion, it may wish to undertake a more complete investigation before deciding whether to defer.

[50] *Babcock* did not change Board law finding *Collyer* deferral inappropriate where an allegation is "inextricably related" to or "closely intertwined" with "'other complaint allegations that are either inappropriate for deferral or for which deferral is not sought.'" *Arvinmeritor, Inc.*, 340 NLRB 1035, 1035 n.1 (2003) (quoting *American Commercial Lines*, 291 NLRB 1066, 1069 (1988), *overruled on other grounds by J. E. Brown Electric*, 315 NLRB 620 (1994)). *See also Clarkson Industries*, 312 NLRB 349, 351-52 (1993) (declining deferral as to "closely related" allegations where arbitrator lacked authority to fashion an appropriate remedy as to one). Thus, the Region should decline to place a Section 8(a)(5) allegation on *Collyer* deferral if it is closely related to a meritorious Section 8(a)(1) or (3) allegation that is non-deferrable (e.g., because *Babcock* applies and the parties have not authorized arbitration of the Section 8(a)(1) or (3) issue). Where a charge concerns allegations of Section 8(a)(1), (3), and (5), the *Babcock* standard applies to the 8(a)(1) and (3) allegations and the parties have authorized the arbitrator to

## IV. Deferral to Grievance Settlements

### A. The *Babcock* Standard

Under *Babcock*, the Board will apply essentially the same deferral standard to grievance settlements as it does to arbitral decisions in Section 8(a)(1) and (3) cases. In such cases, it must be shown that: (1) the parties intended to settle the unfair labor practice issue; (2) they addressed that issue in the settlement agreement; and (3) Board law reasonably permits the settlement agreement.[51] In assessing whether the negotiated settlement is reasonably permitted, the Board will assess the agreement in light of the factors applicable to other non-Board settlement agreements, as set forth in *Independent Stave Co.*[52]

CASEHANDLING INSTRUCTIONS: So long as a grievance settlement is satisfactory under *Independent Stave*, the Region may accept a charging party's request for withdrawal of a charge in cases with arguable merit, since such a request suggests an intent to settle the unfair labor practice and prosecution would not effectuate the purposes of the Act. Any merit cases where the charging party does not withdraw the charge following settlement of the grievance, or where a discriminatee objects to the withdrawal, should be submitted to the Division of Advice with recommendations regarding whether the parties intended that the settlement would resolve the unfair labor practice issue, whether the settlement agreement addresses that issue, and whether the agreement meets the requirements of *Independent Stave*.

### B. Application of the *Babcock* Grievance Settlement Deferral Standard to Pending and Future Cases

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address the statutory issue, Regions should contact the Division of Advice for instructions on how to proceed.

[51] 361 NLRB No. 132, slip op. at 13.

[52] 287 NLRB 740, 743 (1987). The Board in *Independent Stave* identified the following non-exclusive list of factors to consider in evaluating settlements: (1) whether all parties involved agreed to be bound by the non-Board settlement; (2) whether the proposed settlement is reasonable in light of the alleged violation, the risks of litigation, and the stage of litigation; (3) whether there is any indication of fraud, coercion or duress regarding the parties' settlement; and (4) whether the respondent has a history of violations or of breaching previous settlement agreements resolving unfair labor practices.

Although the Board did not articulate whether the new grievance settlement deferral standard would apply retroactively or prospectively, we assume that the policy considerations informing the Board's nuanced approach toward postarbitral deferral apply equally to the grievance settlement context. Thus, we infer that the new standard for evaluating grievance settlements should apply in parallel fashion as the new standard for reviewing arbitral awards, and should apply in all cases where *Babcock* would have applied had the parties proceeded to arbitration. The Region should apply the following rules to determine whether to evaluate a grievance settlement under *Babcock* or the pre-*Babcock* deferral standard set forth in *Alpha Beta Co.*[53] in pending and future cases raising allegations under Section 8(a)(1) and (3):

- *Alpha Beta* applies if the settlement agreement was executed on or before December 15, 2014, the date the *Babcock* decision issued;

- *Babcock* applies if the collective-bargaining agreement under which the grievance arose was executed after December 15, 2014.[54]

- If the collective-bargaining agreement under which the grievance arose was executed on or before December 15, 2014, and the grievance settlement was executed after December 15, 2014, which standard applies depends on whether the parties intended to resolve the unfair labor practice issue via arbitration or settlement. If the arbitrator was explicitly authorized to decide the unfair labor practice issue (either in the collective-bargaining agreement or by agreement of the parties in a particular case), or the parties intended to settle that issue, then *Babcock* applies.[55] As with postarbitral deferral, any questions about whether a

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[53] 273 NLRB 1546, 1547 (1985), *enforced sub nom. Mahon v. NLRB*, 808 F.2d 1342 (9th Cir. 1987). *See also Postal* Service, 300 NLRB 196, 197 (1990).

[54] As with postarbitral deferral, we would likewise apply *Babcock* if the grievance arose under a collective-bargaining agreement that automatically renewed after December 15, 2014 because neither party took action to reopen negotiations pursuant to a contractual renewal clause. Similarly, we would apply *Babcock* if the grievance arose under a post-*Babcock* agreement to extend an expired contract for a set term, unless the extension was a temporary one for the purpose of allowing the parties to continue bargaining over a successor collective-bargaining agreement. In that case, which standard applies depends on whether the arbitrator was explicitly authorized to decide the unfair labor practice.

[55] *Babcock* applies in this scenario even if the Region initially placed the case on administrative deferral pursuant to the preexisting standard for prearbitral deferral.

specific statutory right has been incorporated into the agreement should be submitted to the Division of Advice. If the arbitrator was not authorized to resolve the statutory issue, and the parties did not intend to settle it, then *Alpha Beta* applies.

Any questions regarding the implementation of this memorandum should be directed to the Division of Advice.

Attachments:

1. Letter – to be sent in all currently deferred cases
2. a. *Collyer* deferral letter – *Spielberg/Olin* and *Alpha Beta* apply
   b. *Collyer* deferral letter – *Babcock* applies
   c. *Dubo* deferral letter – *Spielberg/Olin* and *Alpha Beta* apply
   d. *Dubo* deferral letter – *Babcock* applies

cc: NLRBU
Release to the Public